No. GN 302801

SENATORS LETICIA VAN DE PUTTE, GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN HINOJOSA, FRANK MADLA, EDDIE LUCIO, ELIOT SHAPLEIGH, ROYCE WEST, JOHN WHITMIRE, AND JUDITH ZAFFIRINI,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
V.	§	
LIEUTENANT GOVERNOR DAVID DEWHURST, in his official capacity, CARLETON TURNER, in his official capacity as Sergeant-at-Arms for the Texas Senate, and THOMAS A. DAVIS, JR., in his official capacity as Director, Texas Department of Public Safety,	§	
Defendants.	§	98TH JUDICIAL DISTRICT

DEFENDANTS' ORIGINAL ANSWER AND COUNTERCLAIMS FOR DECLARATORY JUDGMENT AND WRIT OF MANDAMUS

TO THE HONORABLE DISTRICT COURT JUDGE:

Defendants David Dewhurst, in his official capacity as Lieutenant Governor and President of the Senate of the State of Texas; Carleton Turner, in his official capacity as Sergeant-at-Arms of the Texas Senate; and Thomas A. Davis, Jr., in his official capacity as Director, Texas Department of Public Safety; answer the allegations in Plaintiffs' Original Petition as set forth below. Defendants Dewhurst and Turner, in their official capacities, also assert counterclaims for declaratory relief and a writ of mandamus for the reasons set forth herein.

ORIGINAL ANSWER

1. Defendants generally deny the allegations in Plaintiffs' Original Petition, as permitted by Tex. R. Civ. P. 92, and demand strict proof thereof.

2. Plaintiffs' contentions regarding "any effort by the Texas Department of Public Safety ("DPS") . . . to arrest the Plaintiff Senators" are not justiciable. Lieutenant Governor Dewhurst has stated publicly that he has no intention of utilizing the DPS to arrest or assist in arresting the Plaintiff Senators as long as the Court's order in *Burnam v. Davis*, No. GN-301665, remains in effect. As such, there is no present controversy regarding the use or potential use of the DPS, and the claims asserted in paragraph 27 of Plaintiffs' Original Petition should be dismissed.

COUNTERCLAIMS

3. David Dewhurst, in his official capacity as Lieutenant Governor and President of the Senate of the State of Texas, and Carleton Turner, in his official capacity as Sergeant-at-Arms of the Texas Senate, assert counterclaims for a declaratory judgment and a writ of mandamus against Plaintiffs Leticia Van de Putte, Gonzalo Barrientos, Rodney Ellis, Mario Gallegos, Jr., Juan Hinojosa, Eddie Lucio, Jr., Frank Madla, Eliot Shapleigh, Royce West, John Whitmire, and Judith Zaffirini as follows:

I.
Jurisdiction and Venue

4. This Court has jurisdiction over this declaratory judgment action pursuant to Article V, §8 of the Texas Constitution and Chapter 37 of the Texas Civil Practice and

Remedies Code, because there is a real and substantial conflict of tangible interests concerning the rights and status of the parties. Moreover, the Court has general jurisdiction to grant mandamus relief against public officials. TEX. CONST. art. V, §8; TEX. GOV'T CODE §24.011; *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 671-672 (Tex. 1995) (orig. proceeding).

5. Venue is proper in Travis County, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(1), because all or a substantial part of the events giving rise to the claim occurred in Travis County. In addition, venue is proper in Travis County, pursuant to Texas Civil Practice and Remedies Code §15.002(a)(2), because Counterdefendant State Senator Gonzalo Barrientos is a resident of Travis County, Texas. Because venue is proper against Senator Barrientos, the Court has venue over all other Counterdefendants pursuant to Texas Civil Practice and Remedies Code §15.005.

II.
Nature of the Counterclaims

6. Over the past hundred days, representative government in Texas has ground to a halt. Twice, elected legislators have fled the State *en masse* in a deliberate attempt to defeat a quorum and close down the Texas Legislature. These Representatives and Senators, frustrated by the will of the majority, have decided to circumvent the legislative process altogether. Believing they lack the votes to prevail on the merits, they have opted to flee the State instead.

7. The Texas Constitution does not allow this option. It places on elected Senators a mandatory duty to attend the Senate when called. Legislators "*shall* meet . . . when convened by the Governor," TEX. CONST. art. III, §5 (emphasis added), and "[n]o member shall absent himself or herself from the sessions of the Senate without leave unless the member be sick or unable to attend," TEX. S. RULE 5.03. Senators may vote as they please; they may speak as they please; but they must show up.

8. Ordinarily, if Senators were to refuse to come to the Senate floor in order to defeat a quorum, the Constitution and Senate Rules would provide a direct remedy: when a call of the Senate is ordered, absent Senators "may be sent for and arrested wherever they may be found" by the Sergeant-at-Arms. *See* TEX. S. RULE 5.04 (prescribing the "manner" in which the Senate may "compel the attendance of absent members" under the express terms of Article III, §10 of the Texas Constitution). Texas Senate Rule 5.04 was voted on and approved by all thirty-one Senators; for eleven Senators to leave the State of Texas frustrates and evades the remedy agreed to by all Senators.

9. In a move unprecedented in the State of Texas, the absent Senators—like the absent Representatives three months earlier—have fled the State altogether, as fugitives from arrest. Thus, their refusal to fulfill their constitutional duty as Senators to attend the Senate session is compounded by their efforts, heretofore successful, to escape the reach of the Texas Constitution and Senate Rules.

10. In these extraordinary circumstances, Texas courts are authorized to defend the Texas Constitution through the writ of mandamus. "It is emphatically the province and duty

of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and here, the law places a mandatory duty upon elected Senators to attend the Senate session and not flout their constitutional obligations by shutting down the Texas Senate.

III.
Statement of Facts

11. On July 28, 2003, Governor Rick Perry issued a proclamation calling the Texas Legislature to convene in special session. Proclamation by the Governor of the State of Texas, July 28, 2003, App. A. The purpose of the special session was to consider legislation relating to: (1) congressional redistricting; (2) certain transportation-related issues; (3) state finance issues, including adjustments to school district fiscal matters; (4) certain election-related issues; and (5) reorganization and reform measures applicable to state government. *Id.*; Special Messages of July 28 and July 29, App. B.

12. Shortly after the call to convene on July 28, Lieutenant Governor and Senate President David Dewhurst called the roll and determined that a quorum was lacking.[1] Affidavit of Patsy Spaw, App. C. Accordingly, a call of the Senate was moved, seconded by five Senators, and passed without objection. *Id.*

13. Eleven Senators failed to convene in Austin for the called session on July 28, choosing instead to flee to Albuquerque, New Mexico that same day. August 1, 2003

[1] An audio link for the July 28, 2003 Senate session can be found at http://www.Senate/AVarch.htm#top.

Letter to Governor Dewhurst from Eleven Absent Senators, App. D. At the time of this filing, they have not returned to Austin.

14. Senator Staples then moved that the Sergeant-at-Arms, or officers appointed by the Sergeant-at-Arms, be sent to compel attendance of the absent Senators. This motion was passed by a majority of the remaining senators without objection. Affidavit of Patsy Spaw, App. C.

15. The absent Senators were aware that the Legislature had been convened and a call made upon the Senate. August 1, 2003 Letter to Governor Dewhurst from Eleven Absent Senators, App. D. Nevertheless, the absent Senators have refused to return to Austin to perform their legislative duties, stating that they will return to work "only under the tradition established by the Senate" that two-thirds of the members agree to take a bill out of order. *Id.*

16. Counterplaintiffs have identified only one other occasion in Texas history when state lawmakers have fled the state in order to break a quorum—less than three months ago when fifty-one House Members fled to Ardmore, Oklahoma—and this current episode follows directly upon the heels of that earlier flight in the 78th Regular Session. *See* Statement from House Democrats, May 12, 2003, App. E. The Representatives who traveled to Ardmore "refus[ed] to provide a quorum" and "refus[ed] to participate" in a legislative process that those legislators believed to be "unfair." *Id.*

17. Now, less than three months later, the absent Senators' current refusal to participate in the legislative process is having an immediate impact upon the State. No bill can

be enacted without consideration by the Senate, TEX. CONST. art. III, §31, and the Senate may not take action to consider legislation without a two-thirds quorum, *id.* art. III, §10. Consequently, the eleven Senators' absence is preventing the Senate as a body from considering any of the five topics made the subject of the second special session.

18. Counterplaintiffs have filed this mandamus action to compel the absent Senators to return to the Senate and allow the Legislature to conduct its business.

19. Moreover, public accounts indicate that attorneys for the eleven Plaintiffs have advised the absent Senators that Carleton Turner, Sergeant-at-Arms of the Texas Senate, could be civilly and criminally liable if he compels the attendance of absent Senators pursuant to Senate rules. *See* R.G. Ratcliffe, *Democrats May Be Free to Flee*, HOUSTON CHRON., July 25, 2003, at 1A, App. F.

20. Accordingly, Counterplaintiffs request that this Court enter declaratory relief stating that compulsion of attendance pursuant to Senate rules is neither unlawful nor unconstitutional.

IV.
Counterplaintiffs are Entitled to Declaratory Relief

A. THERE ARE NO MATERIAL DISPUTES OF FACT.

21. The relevant facts in this case are few, and are not subject to dispute. It is a matter of public record that a second special session has been called; that Plaintiffs were and are absent; that, as a result of their absence, a quorum is lacking; and that a call of the Senate has issued. As the attached materials demonstrate, Plaintiffs have been

publicly questioning the authority of the Senate Sergeant-at-Arms to arrest absent Senators, and have been threatening legal action if he were to do so. Given those unquestioned facts, the only issue in this declaratory-judgment counterclaim is the pure legal issue of the constitutional and legal authority of Senate President Dewhurst and Sergeant-at-Arms Turner to compel the attendance of absent Senators through arrest pursuant to Senate Rule 5.04.

B. COUNTERPLAINTIFFS DEWHURST AND TURNER ARE ENTITLED TO DECLARATORY RELIEF AS A MATTER OF LAW BECAUSE SENATE RULES 5.02 AND 5.04—EXPRESSLY AUTHORIZED BY THE TEXAS CONSTITUTION—EXPLICITLY GRANT THE SERGEANT-AT-ARMS THE AUTHORITY TO ARREST ABSENT SENATORS IN ORDER TO COMPEL THEIR ATTENDANCE IN THE SENATE FOR THE PURPOSE OF SECURING A QUORUM.

22. Public accounts indicate that attorneys for the eleven Plaintiffs have advised the absent Senators that Sergeant-at-Arms Turner could be prosecuted for kidnapping under Texas law if he compels the Plaintiffs to attend the Legislature's special session. *See* Ratcliffe, at 1A. Those same attorneys have apparently advised that any person who directs such compulsion would be guilty of "the crime of conspiracy to commit aggravated kidnapping." *Id.* Counterplaintiffs Turner and Dewhurst are understandably concerned with such accusations of potential wrongdoing, yet they are faced at the same time with the plain language of Senate Rules 5.02 and 5.04—rules that expressly permit them to compel the absent Senators to attend to their constitutional duties. *See* TEX. S. RULE 5.02 & .04. To clarify their respective rights and duties under Senate rules, Counterplaintiffs Turner and Dewhurst request that this Court grant the requested declaratory relief.

1. The Plain Language of the Texas Constitution and the Senate Rules Authorizes the Senate to Arrest Absent Senators to Compel Attendance and Establish a Quorum.

23. The Texas Constitution expressly authorizes each House of the Legislature to compel the attendance of absent members to achieve a quorum:

> Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and *compel the attendance of absent members, in such manner and under such penalties as each House may provide.*

TEX. CONST. art. III, §10 (emphasis added). This provision derives from the United States Constitution, which confers the same authority on both Houses of Congress:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

U.S. CONST. art. I, §5, cl. 1; *see also* TEX. CONST. art. III, §10 interp. commentary (Vernon 1997) (observing that the Texas provision "is borrowed from the Federal Constitution as applicable to the Congress"). Given this relationship between the Texas and federal provisions, authorities interpreting the latter can be persuasive in construing the former. *See Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992) (orig. proceeding) (advising that courts interpreting the Texas Constitution "should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful").

24. Both constitutional provisions, in turn, expressly leave it to each House to determine the "manner" of compelling attendance. The Texas Senate has determined the manner of compelling attendance through the Senate Rules. Texas Senate Rule 5.02 provides that less than two-thirds of the Senators may dispatch the Sergeant-at-Arms or others to retrieve absent Senators so that a quorum may be established:

> Two-thirds of all the Senators elected shall constitute a quorum, but a smaller number may adjourn or recess from day to day and compel the attendance of absent members (Constitution, Article III, Section 10). In case a less number shall convene, the members present *may send the Sergeant-at-Arms or any other person or persons for any or all absent members.*

TEX. S. RULE 5.02 (emphasis added). Rule 5.04 elaborates on the procedures to obtain the presence of absent Senators, including arrest:

> . . . When a call of the Senate is . . . ordered by a majority of those present, the Doorkeeper shall close the main entrance to the floor of the Senate. All other doors leading from the floor of the Senate shall be locked and no member shall be permitted to leave the Senate without written permission of the presiding officer. . . . The Secretary shall call the roll of members and note the absentees. Those for whom no sufficient excuse is made, by order of the majority of those present, *may be sent for and arrested wherever they may be found and their attendance secured and retained by the Sergeant-at-Arms or officers appointed by the Sergeant for that purpose.* . . . When a quorum is shown to be present, the Senate may proceed . . . . *If the Senate decides to proceed, the Sergeant-at-Arms shall not be required to bring in other absentees* unless so ordered by a majority vote of the Senate.

TEX. S. RULE 5.04 (emphases added). Thus, the Texas Constitution expressly authorizes the Senate both to compel the attendance of absent Members and to determine the "manner" of doing so; the Senate Rules, in turn, explicitly authorize the

Sergeant-at-Arms, when so directed, to arrest absent Members "wherever they may be found."[2]

a. State Court Authority

25. Texas courts have not had the opportunity to construe either the constitutional provision authorizing the Legislature to compel the attendance of absent members or the legislative rules implementing that power. The Texas Supreme Court has, however, examined the Legislature's authority under an analogous section of the Texas Constitution—that empowering the Legislature to imprison *non-members* for obstructing legislative proceedings. *See* TEX. CONST. art. III, §15. In *Canfield v. Gresham*, 82 Tex. 10, 17 S.W. 390 (1891), a newspaper reporter had caused the Speaker of the House to be arrested during the legislative session. Deeming this act to be an "obstruction of its proceedings," the Texas House of Representatives invoked its power under Article III, §15 and directed the House Sergeant-at-Arms to arrest the reporter and confine him in the Travis County Jail. The reporter subsequently sued the Sergeant-at-Arms and the House Members who had voted to detain him for unlawful arrest and false imprisonment. The district court directed a verdict in favor

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[2] Nothing in the district court's initial letter ruling in *Burnam v. Davis*, No. GN-301665 (250th Dist. Ct., Travis County, Tex., June 13, 2003), or its subsequent order, *Burnam v. Davis*, No. GN-301665 (250th Dist. Ct., Travis County, Tex., Aug. 4, 2003), is inconsistent with this conclusion. In that letter ruling, the court considered the statutory authority of the Department of Public Safety (DPS) to arrest Members of the Texas House of Representatives pursuant to House Rule 5, §7, and concluded that DPS's statutory authority did not allow it to do so. That ruling was made without the benefit of full briefing, and will be vigorously challenged on appeal. In any event, the extent of DPS's statutory authorization is utterly irrelevant to the separate question of the legal authority of the Senate itself and the Senate Sergeant-at-Arms—a question that is controlled by the Texas Constitution.

of the Sergeant-at-Arms and the House Members, and the reporter appealed. The Texas Supreme Court affirmed:

> The house had unquestionably the right to determine whether or not the acts of plaintiff were an obstruction to its proceedings within the meaning of the constitution, and, having so determined, to cause him to be imprisoned as he was. The command of the house protected the sergeant at arms. The judgment is affirmed.

82 Tex. at 17, 17 S.W. at 393. By analogy, Article III, §10 affords similar deference and discretion to the Senate and its officers to compel the attendance of absent Members.

b. Federal Authority

26. The United States Senate also has adopted a rule implementing its authority under the United States Constitution to compel the attendance of absent members. *See* U.S. S. RULE VI, ¶ 4. That rule authorizes a majority of the Senators present to direct the Sergeant-at-Arms "to request, and when necessary, to compel the attendance of the absent Senators." *Id.; see also* RIDDICK'S SENATE PROCEDURE, 101st Cong., 2d Sess. 214 (2002) (noting that "if a quorum is not obtained in a reasonable length of time, the Senate could resort to the adoption of a motion to direct the Sergeant at Arms or his deputies *to arrest* absent Senators and bring them to the bar of the Senate"). This rule appears to have been invoked as recently as February 1988, when "Capitol Police carried Senator Bob Packwood feet first into the Senate chamber. This occurred after the Senate ordered the arrest of absent senators to maintain a quorum during a filibuster on campaign finance legislation." U.S. Senate, *Compulsory Attendance, at*

http://www.senate.gov/artandhistory/history/minute/Compulsory_Attendance.htm (last visited July 26, 2003).

27. Only one reported decision construes Congress's constitutional authority to compel the attendance of members to secure a quorum. In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the Supreme Court considered a challenge to an order from the House of Representatives declaring a witness in contempt for refusing to answer questions before a House special committee. In discussing Congress's authority under Article I, §5, the Court commented in dictum that "the penalty which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject." *Id.* at 190. Presumably, if the Constitution authorizes the Congress to *imprison* an absent member in aid of securing his attendance, it necessarily would authorize the less severe approach of arrest and return to the Chamber.

c. Authority from Other Jurisdictions

28. At least two courts have expressly affirmed the authority of legislative officers to arrest absent members for purposes of securing a quorum under similar provisions in other state constitutions. In *Schultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985) (per curiam), the President of the Alaska State Senate ordered state troopers to arrest an absent representative to secure his attendance at a joint session of the Alaska Legislature so that a quorum would be present to confirm various executive appointees. The Representative subsequently sued the Senate President for violations

of his civil rights. The district court dismissed the suit, and the Ninth Circuit affirmed. Specifically, the court of appeals held that the Senate President was entitled to absolute legislative immunity because his actions were within the "legitimate legislative sphere." *Id.* at 716-17.

29. Similarly, in *Keefe v. Roberts*, 355 A.2d 824 (N.H. 1976) (per curiam), the Speaker of the New Hampshire House of Representatives ordered the House Sergeant-at-Arms to arrest an absent representative and return him to the chamber in order to secure a quorum. The Representative subsequently sued the Speaker for false arrest and false imprisonment. The district court dismissed, and the New Hampshire Supreme Court affirmed. The court held that the arrest to secure a quorum was within the "sphere of legitimate legislative activity," and therefore, the Speaker was entitled to absolute legislative immunity. *Id.* at 827.

2. The Sergeant-at-Arms Has Full Arrest Authority.

30. Senate Rule 5.04 authorized the Sergeant-at-Arms or his appointees to "arrest" absent Senators. "Arrest" is defined by Black's Law Dictionary as "[a] seizure or forcible restraint, [t]he taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." BLACK'S LAW DICTIONARY 104 (7th ed. 1999).

31. "Arrest" in this context does not mean to take into custody for the purposes of criminal prosecution. Rather, the Sergeant-at-Arms is empowered to arrest absent Senators—that is, to physically seize their persons by use of any reasonably necessary force—for one and only one purpose: to bring them to the floor of the Texas Senate.

32. That the Senate Rules contemplate physical arrest is plain from the text. Rule 5.04 provides that absent Senators "may be sent for *and arrested* wherever they may be found and their attendance *secured and retained* by the Sergeant-at-Arms or officers appointed by the Sergeant for that purpose." TEX. S. RULE 5.04 (emphases added). The Rule goes on to note that, once a quorum is achieved, "the Sergeant-at-Arms shall not be required to *bring in* other absentees unless so ordered by a majority vote of the Senate." *Id.* (emphasis added).

33. The Editorial Notes to Rule 5.04 contemplate that the presiding officer of the Senate may issue a form of summons for the absent Senators, and that the Sergeant-at-Arms has broad discretion to enforce that summons:

> It is, no doubt, within the province of the Senate to adopt a rule authorizing the presiding officer of the Senate during a call of the Senate to issue to any absentee a written demand that the absentee attend the Senate's session and giving to the Sergeant-at-Arms or his deputies authority to serve and to enforce the demand *by whatever means necessary*.

TEX. S. RULE 5.04 ed. notes (emphasis added). Several commentators also have acknowledged that the House and Senate Rules authorize the use of forcible arrest to secure the attendance of absentees. *See, e.g.*, TEX. CONST. art. III, §10 interp. commentary (Vernon 1997) (noting that "[t]he usual manner to secure a quorum when members absent themselves so as to prevent a quorum is to arrest the absentees and force them to attend the sessions of the house of which they are members"); GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 117-18 (1977) (observing that a house of the Texas

Legislature may secure a quorum by "sending out the sergeant-at-arms to bring in absent members, and the House rules make clear that he may arrest them for this purpose"); JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 84 (1996) (explaining that "[i]n the absence of a quorum, the members may vote for a 'call of the House' to close the doors to keep members in and to order the sergeant-at-arms and other officers to find absent members who, by force if necessary, are returned to the chamber").

34. In an analogous context, the United States Supreme Court has held that the United States Senate is fully authorized to compel forcibly the attendance of witnesses to testify in Senate investigations. *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929); *McGrain v. Daugherty*, 273 U.S. 135 (1927). In *Barry,* Thomas W. Cunningham refused to testify before a Senate committee investigating a Senate election, and the Senate passed a resolution "instructing the President [of the Senate] to issue his warrant commanding the sergeant-at-arms or his deputy to take the body of Cunningham into custody, and to bring him before the bar of the Senate" to answer questions pertinent to the investigation. After Cunningham was taken into custody, he sought a writ of habeas corpus, claiming that the Senate's actions were unauthorized. 279 U.S. at 609-11.

35. The district court denied the writ, and the court of appeals reversed. *Id.* at 612. The United States Supreme Court reversed again, holding that the Senate's constitutional authority to investigate senatorial elections included the power to order arrests to

compel attendance of witnesses. *Id.* at 615-16. The Court noted that the Senate's power in this respect was comparable to that of a court, which "has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming." *Id.* at 616.

36. For its holding, the *Barry* Court relied on *McGrain v. Daugherty*, 273 U.S. 135 (1927). Like *Barry*, *McGrain* was a habeas corpus proceeding brought by a reluctant witness who had been physically arrested and brought before the United States Senate to testify pursuant to an investigation undertaken by that body. *McGrain* similarly addressed whether the Senate "has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *Id.* at 154. The Court had little trouble concluding that it does:

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time.

Id. at 174. Accordingly, the Court held the Senate's actions authorized by law and reversed the district court's order discharging the witness from custody. *Id.* at 182.

37. Further analogous support for the Texas Senate's power to arrest its absent Members can be found in federal law providing for the arrest of material witnesses to compel their testimony in criminal proceedings when circumstances suggest that a witness is unlikely to testify willingly. *See* 18 U.S.C. §3144 (authorizing judicial officers to order the arrest of material witnesses in criminal proceedings "if it is shown that it may become impracticable to secure the presence of the person by subpoena"). Even before §3144, courts were held to be authorized to order witnesses arrested to compel their testimony even before they had disobeyed a *subpoena ad testificandum*. *See Bacon v. United States*, 449 F.2d 933, 936-37 (9th Cir. 1971).

38. Witnesses—who have committed no crime and are not themselves subject to criminal arrest or detention—may be arrested and physically detained without bail to secure their attendance in court because their testimony is essential to the court's function of adjudicating cases and enforcing the law. *See Bacon*, 449 F.2d at 940; *see also id.* at 937 ("Congress cannot be presumed to have granted a power to the courts and yet withheld the only effective means of implementing it."). The Texas Senate's constitutional authority to have absent Members arrested and physically returned to the Senate floor is similarly derived from the Framers' intent that the Senate be able to carry out its legislative duties effectively. *See* TEX. CONST. art. III, §10 (providing for compulsion of absent Members to ensure legislative quorum).

39. Counterdefendants' claims of alleged illegality—*i.e.*, stalking, criminal trespass, assault, kidnapping, and unlawful restraint—are therefore in conflict with both the plain language and the intent of the Texas Constitution.

40. Since the Texas Constitution supercedes other civil and criminal law, and since arrest of absent Senators is expressly authorized, Counterdefendants' position must be flatly rejected. Accordingly, Counterplaintiffs are entitled to judgment on their claim for declaratory relief that compulsion under Senate Rules 5.02 and 5.04 is not unlawful.

41. Compulsion under Senate Rules 5.02 and 5.04 falls outside the plain language of Texas's criminal statutes, and Counterplaintiffs are entitled to declaratory judgment that their actions under the Senate rules would not subject them to civil or criminal liability.

C. ARTICLE III, SECTION 14 OF THE TEXAS CONSTITUTION DOES NOT IMMUNIZE THE ABSENT SENATORS FROM ARREST UNDER ARTICLE III, §10 OF THE CONSTITUTION.

42. The absent Senators have claimed that Article III, §14 of the Texas Constitution immunizes them from arrest by the Sergeant-at-Arms of the Senate. Complaint ¶25. Article III, §14 provides that legislators may not be arrested during a legislative session, or while going to or returning from a session, unless the arrest is for an indictable offense:

> Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same.

TEX. CONST. art. III, §14. The absent Senators are incorrect, for several reasons.

43. First, arrests to secure a Senate quorum—made pursuant to the direction of the Senate—are simply not the sort of arrests from which legislators are immune. Indeed, to read Article III, §14 in such an overbroad manner would render meaningless Article III, §10's provision that the Senate may "compel the attendance of absent members, in such manner and under such penalties as each House may provide." TEX. CONST. art. III, §10.[3] Under any sensible reading, Article III, §14 must be read in a way that harmonizes it with Article III, §10.

44. Second, and critically, the very purpose of the privilege from arrest is to ensure that the business of the Legislature is not impeded by the improper detention of legislators. TEX. CONST. art. III, §14 interp. commentary (Vernon 1997) (noting that the privilege from arrest "has as its purpose not only the protection of the legislators, but also the public in that it aids in the uninterrupted performance of the legislator's duties"). Article III, §10 shares the same purpose, which would be thwarted if a legislator were allowed to invoke the privilege to halt the business of the Legislature by resisting an arrest intended to establish a quorum. Such cannot be, and is not, the law; both Article III, §14 and Article III, §10 serve the identical purpose: ensuring that the

[3] Moreover, Senate Rule 5.04 expressly provides that, pursuant to Article III, §10, absent Senators "may be sent for and arrested wherever they may be found," and every single one of the absent Senators voted unanimously to adopt the Senate Rules of which they now complain.

Texas Legislature can conduct the people's business free from improper efforts to impede its ability to convene.

45. Third, Article III, § 14, is based on—and nearly identical to—Article I, §6 of the United States Constitution, which provides:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . .

U.S. CONST. art. I, §6. Like the Texas privilege modeled upon it, the federal constitutional privilege was crafted to "insure that legislators are not distracted from or hindered in *the performance of their legislative tasks*." *Powell v. McCormack*, 395 U.S. 486, 505 (1969) (emphasis added). Given the inter-relationship between the federal and Texas constitutional privileges, authorities interpreting the federal provision are persuasive in construing the Texas provision. *See Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992). And history is replete with examples of Members of Congress being subject to arrest to secure a quorum, with no impediment raised by Article I, §6. *See generally* IV HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907). In fact, the First Congress (1789) passed a rule providing for absentees from a call of the House to "be taken into custody." *Id.* §2982. In the Thirtieth Congress (1848), absent Members were brought to the floor "in custody of the Sergeant-at-Arms" to take their seats "on payment of fees." *Id.* §3025. Congressman Howard, of Ohio, was arrested by the Sergeant-at-Arms and

brought to the Chamber during a call of the House in the Thirty-Sixth Congress (1860). *Id.* §3023. The Speaker found Congressman Murphy, of Missouri, was "lawfully and legally arrested [by the Assistant Sergeant-at-Arms] under the rules of the House without or with [a] warrant" in the Fifty-Ninth Congress (1906). *Id.* §3043. The previous day, several Congressmen were "present[ed] at the bar of the House, under arrest," by the Assistant Sergeant-at-Arms. *Id.* §3044. These are but a few examples of the widespread historical practice of arresting legislators to secure a quorum, notwithstanding Article I, Section 6 of the Constitution. *See generally id.* §§2980-3054. More recently, the arrest of Senator Packwood of Oregon, who was absent from the Senate floor in an attempt to break a quorum, made national headlines. Helen Dewar, *Midnight Manhunt in the Senate: 'Banana Republic' Dragnet Hit After Packwood's Arrest Filibuster*, Wash. Post, Feb. 25, 1988, at A1, available at 1988 WL 2070257 (stating Senator Packwood was arrested "and carried . . . feet-first into the Senate Chamber in a flamboyant climax to a bitter all-night filibuster fight").

46. Fourth, federal authorities construing the analogous privilege afforded Members of Congress have noted that the privilege is limited to arrests in civil suits. *Long v. Ansell*, 293 U.S. 76, 83 (1934) ("When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies."); *see also Williamson v. United States*, 207 U.S. 425 (1908) (discussing

history of privilege at common law and concluding that it applies only in civil suits). Indeed, *Williamson* is the lone case Plaintiffs cite for their contention that Article III, §14 renders them immune. But that argument is predicated on a fundamental misunderstanding of *Williamson*.

47. In earlier centuries, arrest was a common means of initiating a civil suit; the *Williamson* Court made clear that a private plaintiff could not prevent the meeting of the Legislature by arresting a Representative for a civil suit and preventing him from attending session. *Id.* at 438 (noting historical interpretation of privilege as "apply[ing] only to prosecutions of a civil nature"). Critically, however, the arrest authorized by Article III, §10 and Senate Rule 5.04 *is not an arrest in aid of a civil suit*. Neither is it a criminal arrest. Rather, it is a legislative arrest—for the single purpose of ensuring the Senate can continue to do the people's business—expressly authorized by the Texas Constitution and the Senate Rules. And, rather than delaying a Senator from appearing on the floor of the Senate (as would an impermissible civil arrest), the legislative arrest would bring the Senator to the floor of the Senate.

48. Tellingly, Plaintiffs cannot cite even a single case supporting the novel proposition that the legislative privilege from arrest immunizes legislators from constitutionally-authorized arrests by the legislature to ensure a legislative quorum. Indeed, other States interpreting similar provisions have roundly rejected Plaintiffs' assertions. For example, in *Keefe v. Roberts*, 355 A.2d 824 (N.H. 1976) (per curiam), the Speaker of the New Hampshire House of Representatives ordered the House Sergeant-at-Arms

to arrest an absent Representative and return him to the chamber in order to secure a quorum. In his suit for false arrest, the Representative cited the analogous provision of the New Hampshire Constitution affording legislators immunity from arrest. The New Hampshire Supreme Court rejected this theory, holding that "[t]his type of custody by the sergeant-at-arms at the direction of the speaker attempting to secure a quorum is not the type of arrest which this provision was intended to prevent." *Id.* at 827. Also, the New York Court of Appeals has held that the privilege does not protect a legislator from service of a subpoena to attend a committee meeting because, even if disobedience of the subpoena gave rise to an arrest, it would not be "an arrest in a civil action or proceeding," but rather "in aid of a legislative function." *People ex rel. Hastings v. Hofstadter*, 180 N.E. 106, 107 (N.Y. 1932).

D. THE TEXAS CONSTITUTION AFFORDS THE GOVERNOR PLENARY POWER OVER IF AND WHEN TO CALL A SPECIAL SESSION OF THE LEGISLATURE, AND IT IS NO DEFENSE TO THE CONSTITUTIONAL POWER OF THE SENATE TO COMPEL ATTENDANCE OF ABSENT SENATORS UNDER ARTICLE III, §10 THAT THE ABSENT SENATORS DISAGREE WITH THE GOVERNOR'S STATED REASONS FOR CALLING THE SESSION.

49. It is well settled that the Texas Governor has absolute discretion to determine whether calling a special session of the Legislature is appropriate under Article IV, § 8 of the Constitution. *See Walker v. Baker*, 196 S.W.2d 324, 328 (Tex. 1946) (orig. proceeding) ("Art. IV, Sec. 8, empowers the Governor to call special sessions of the Legislature, and its effect is to rest that matter *exclusively in his judgment and discretion*." (emphasis added)). Courts in other states with similar constitutional

provisions have repeatedly held that this determination is to be made solely within the judgment of the Governors of those states. *See, e.g., Miles v. Idaho Power Co.*, 778 P.2d 757, 761 (Idaho 1989) ("It would be an unprecedented proceeding for the court to entertain a controversy wherein proof is offered to ascertain judicially whether an extraordinary occasion existed of sufficient gravity to authorize the governor to convene the legislature in extra session. The character of the legislation to be considered by the legislature was by the constitution left to the governor, and a review of such a discretionary act of the governor should not be done by the courts."); *In re State Census*, 21 P. 477, 477 (Colo. 1886) (per curiam) ("Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session . . . is a matter resting entirely in the judgment of the executive."); *see also Gulledge v. Barclay*, 84 S.W.3d 850, 855 (Ark. 2002); *Jaksha v. State*, 385 N.W.2d 922, 927 (Neb. 1986) (orig. proceeding); *Pannell v. Thompson*, 589 P.2d 1235, 1241 (Wash. 1979); *Opinion of the Justices*, 198 A.2d 687, 689 (Del. 1964); *Opinion of the Justices*, 152 So.2d 427, 428 (Ala. 1963).

50. Further, it is clear that a special session need not be called to address an emergency or other urgent matter in order for the circumstances to be sufficiently "extraordinary." *See Farrelly v. Cole*, 56 P. 492, 497 (Kan. 1899) (holding that neither the Kansas Constitution, nor the United States Constitution, which contains a similar provision, contemplates a Governor or the President of the United States calling a special session of the legislature only out of "over-powering and urgent

necessity"). The interpretative commentary to the Texas Constitution confirms that the Framers intended the Governor to have plenary discretion to determine whether to call a special session:

> It would seem that by the use of the words 'extraordinary session' the framers intended the legislature to be called only in cases of emergency when urgent and vital problems had to be considered. However, such an interpretation has not been given to the words, and the governor, in actual practice, is left to his own discretion and judgment in calling. *He may call at any time and for any reason*, although he must state his purpose in the proclamation calling the legislators to special session.

TEX. CONST. art. IV, §8 interp. commentary (West 1997) (emphasis added).

51. Unsurprisingly, Plaintiffs cannot cite even a single case for their extraordinary proposition that disagreement with the purposes of a special session immunizes legislators from their duty to attend that session. Simply, whether the reasons for calling a particular special session are important enough to merit doing so is not remotely justiciable. Rather, the matter is left by the Constitution solely to the discretion of the Governor. And, the simple fact that the absent Senators disagree with the Governor's stated reasons for calling the special session does not alter his authority to do so or—critically—the Senate's authority to compel their attendance if they deliberately break a quorum.

V.

Counterplaintiffs are Entitled to a Writ of Mandamus

52. Counterplaintiffs filed yesterday a mandamus action in the Texas Supreme Court, virtually identical to this counterclaim but without the accompanying declaratory judgment action. Counterplaintiffs believe that the Supreme Court has original mandamus jurisdiction over Counterdefendants and have asked the Supreme Court to exercise it in this case because of the critical need for prompt judicial resolution, and because this case involves issues of statewide importance. However, out of an abundance of caution, Defendants are filing this district-court mandamus counterclaim as well so that the claim may proceed as expeditiously as possible in the event that the Supreme Court declines to exercise jurisdiction. If the Supreme Court concludes it has jurisdiction over the original mandamus, Plaintiffs will promptly move to abate the mandamus counterclaim in this Court.

A. THE TEXAS CONSTITUTION AND THE SENATE RULES IMPOSE ON STATE SENATORS A NON-DISCRETIONARY DUTY TO RESPOND TO A CALL OF THE SENATE AND ATTEND LEGISLATIVE SESSIONS.

53. The Texas Constitution imposes upon all state legislators—including Counterdefendant Senators—a mandatory duty to attend special legislative sessions called by the Governor. *See* TEX. CONST. art. III, §5(a) ("The Legislature *shall* meet every two years at such time as may be provided by law *and at other times when convened by the Governor.*") (emphasis added); *see also Walker v. Baker*, 196 S.W.2d 324 (Tex. 1946) (orig. proceeding) (holding that Governor has sole power to convene legislative sessions, and noting that Article III, §5 exclusively provides for how and when Senate may convene). Moreover, Senate Rule 5.03 states that "[n]o member

shall absent himself or herself from the sessions of the Senate without leave unless the member be sick or unable to attend." TEX. S. RULE 5.03. Thus, both the Texas Constitution and the Senate rules create a duty to attend legislative sessions that the absent Senators are presently refusing to obey.

54. The mandatory nature of this duty is reflected in both constitutional and rule provisions authorizing compulsion of attendance. Article III, §10 of the Texas Constitution authorizes each House of the Legislature to compel the attendance of absent Members to achieve a quorum:

> Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and *compel the attendance of absent members, in such manner and under such penalties as each House may provide.*

TEX. CONST. art. III, §10 (emphasis added). This constitutional language provides the basis for Senate Rule 5.02, which further provides that a sub-quorum number of Senators may convene and compel the attendance of absent members by "send[ing] the Sergeant-at-Arms or any other person or persons for any or all absent members." TEX. S. RULE 5.02.

55. After a call of the Senate is moved for and seconded, the Senate doors are to be locked and a roll call taken, with any absences noted. TEX. S. RULE 5.04. "Those for whom no sufficient excuse is made, by order of the majority of those present, may be sent for and arrested wherever they may be found and their attendance secured and retained by the Sergeant-at-Arms or officers appointed by the Sergeant for that

purpose." *Id.* The authority to compel attendance provided by the Constitution and Senate Rules removes any doubt that the duty to attend legislative sessions is mandatory and non-discretionary.

56. The mandatory and binding nature of the duty is further reflected in the Preamble to the Rules of the Senate of the 78th Texas Legislature, which provides:

> Pursuant to and under the authority of Article III, Section 11, of the Constitution of 1876, as amended, and notwithstanding any other provision of statute, the Senate adopts the following rules to govern its operations and procedures. The provisions of these rules and of the Constitution shall be deemed the only requirements *binding* on the Senate, notwithstanding any other requirements expressed elsewhere in statute.

PREAMBLE TO TEX. S. RULES, Statement of Authorization and Precedence (emphasis added). All Members of the Texas Senate—including the absent Senators—voluntarily bound themselves by unanimous agreement to the Senate's constitutionally authorized duty of compulsory attendance and took an oath swearing that they would "faithfully execute the duties of the office" of State Senator and "preserve, protect, and defend the Constitution and laws" of Texas. *See* TEX. CONST. art. XVI, §1. Therefore, the absent Senators should not be heard to argue either that they have no duty to attend simply because they have fled the State or that their flight has placed them outside the range within which the duty can be enforced.

57. The purpose behind the mandatory attendance is made clear by the absent Senators' effect on legislation; were it otherwise, any time that a limited number of legislators decided that they were opposed to any item on a special session agenda, they could

effectively end the session before it began by failing to attend to make a quorum. Such conduct is unconstitutional because it deprives the Governor of his constitutional authority to call a special session. *See* TEX. CONST. art. IV, §8; *id.* art. III, §5. No law or authority allows a limited group of legislators to dictate whether a legislative session will take place.

B. THIS COURT HAS AUTHORITY TO ISSUE A WRIT OF MANDAMUS COMPELLING ABSENT SENATORS TO RETURN TO THE FLOOR OF THE TEXAS SENATE IN RESPONSE TO THE LIEUTENANT GOVERNOR'S CALL TO QUORUM.

1. Mandamus Is Available to Compel State Officials to Perform Their Non-Discretionary Duties.

58. "A writ of mandamus will issue to compel a public official to perform a ministerial act." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). There is "no[] doubt that a public officer . . . may be guilty of . . . such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined," and "in such a case a mandamus would afford a remedy where there was no other adequate remedy provided by law." *See Arberry v. Beavers*, 6 Tex. 457, 1851 WL 4016, *11 (Tex. 1851).

59. An act is ministerial when the duty is clearly defined by law with such certainty that nothing is left to the exercise of discretion. *Anderson*, 806 S.W.2d at 793; *see also Turner v. Pruitt*, 342 S.W.2d 422, 423 (Tex. 1961) ("Writs of mandamus issue to control the conduct of an officer of government . . . when the duty to do the act commanded is clear and definite and involves the exercise of no discretion—that is,

when the act is ministerial."); *P.P. Rains v. Simpson*, 50 Tex. 495, 1878 WL 9285 at *4 (1878) (stating that a ministerial act is one whose duties are defined with "such precision and certainty as to leave nothing to the exercise of discretion or judgment").

60. Mandamus will lie when there is (1) a legal duty to perform a non-discretionary act, (2) a demand for performance, and (3) a refusal to perform. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992) (orig. proceeding) (citing *Doctors Hosp. Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 178 (Tex. 1988)). All three elements exist in the present case.

61. Both the Texas Constitution and the Senate Rules obligate Senators to respond to a call of the Senate and attend legislative sessions called by the Governor. *See* TEX. CONST. art. III, §§5, 10; TEX. S. RULE 5.03. As discussed above, the act of attendance is ministerial because it is clear, precise, unambiguous, and does not require discretion.

62. The fact that Counterdefendants have refused Counterplaintiffs' demand to return to the Senate chamber is not in dispute, as Counterdefendants' letter to Lieutenant Governor Dewhurst reveals. *See* August 1, 2003 Letter to Lieutenant Governor Dewhurst from Eleven Absent Senators, App. D. In these circumstances, mandamus is available to compel the performance of the ministerial act. *See Jessen Assocs. v. Bullock*, 531 S.W.2d 593, 602 (Tex. 1975) (orig. proceeding) (holding that mandamus lies "where the duty to act is clear and there is no disputed question of fact").

2. Mandamus Is Uniquely Appropriate In The Circumstances of This Case.

63. Under both the Texas Constitution and the Senate Rules, the absent Senators have an official, non-discretionary duty to attend the current Special Legislative Session that was called on July 28, 2003, unless they are sick or otherwise physically unable to attend. The absent Senators are neither. They have stated numerous times that their express purpose in traveling to New Mexico was to block a quorum in the Senate and thereby prevent that body from taking action. Accordingly, this Court should issue a writ of mandamus ordering the absent Senators to return to the Chamber of the Senate and comply with their non-discretionary duty to attend the legislative session called by the Governor.

64. If mandamus were unavailable, there would be no effective remedy to compel the absent Senators to perform those duties imposed upon them by both the Texas Constitution and their own Rules. In ordinary circumstances, the Constitution and Senate Rules provide a direct remedy: arrest by the Sergeant-at-Arms pursuant to Senate Rules 5.02 and 5.04 and Article III, §10 of the Constitution. But, through their act of fleeing the State altogether, the absent Senators have utterly frustrated the ordinary remedy, leaving the Senate in complete disarray.

65. If there is no remedy for the absent Senators' refusal to perform their constitutional duty, then the structural safeguards that ensure the Legislature may meet and conduct the State's business will be eroded, to the detriment of the State of Texas. And, a roadmap for future derelictions of duty will be established if any group of Legislators

opposing legislation favored by a majority can simply refuse to carry out their duties, deny a quorum, and flee the State. To say the least, such an outcome does not serve the interests of the people of the State of Texas. Nor does the Constitution envision allowing the legislative process to be taken hostage by a limited group of absent Legislators.

66. It is black-letter law that mandamus will lie to compel the performance of an official's purely ministerial or non-discretionary duty. That the absent Senators' appearance is required is equally indisputable, as both the Texas Constitution and the Senate's own rules make their attendance mandatory. Accordingly, Counterplaintiff's request for this Court to issue a writ of mandamus to compel the absent Senators to appear and return to the Senate floor immediately is both necessary and proper.

C. THE CASE PRESENTS A JUSTICIABLE CONTROVERSY.

67. The Texas Supreme Court has previously exercised its power to decide disputes between competing political factions or entities when a legal right is at stake or the controversy involves the interpretation of a statute or constitutional provision. *See Gilmore v. Waples*, 188 S.W. 1037, 1042 (Tex. 1916) ("However much the courts desired to do so, they could not avoid the responsibility of deciding such questions, even if perchance some one should fail to discriminate between political rights and those legal rights which arise under the law, and declare the court was adjudicating purely political questions.").

68. Under the federal system of government, which closely parallels the state system, the *appropriateness* of a legislative rule may be a political question. *See United States v. Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 509 (1892) (stating that Congressional rules may not "ignore constitutional restraints or violate fundamental rights," and that "there should be a reasonable relation between the mode or method or proceeding established by the rule and the result which is sought to be attained," but holding that "within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just").

69. Once a legislative body has enacted a rule, however, its *compliance* with that rule is a justiciable issue. *Yellin v. United States*, 374 U.S. 109, 83 S.Ct. 1828 (1963). In *Yellin*, a Senate witness had been convicted of contempt for "willfully refusing to answer questions put to him by a Subcommittee of the House Committee on Un-American Activities." 374 U.S. at 111, 83 S.Ct. at 1830. The United States Supreme Court vacated the contempt conviction because the Committee failed to comply with its own rule, which "provid[ed] for an executive session when a public hearing might unjustly injure a witness' reputation." 374 U.S. at 116, 83 S.Ct. at 1833. In so holding, the Court observed: "It has been long settled, of course, that rules of Congress and its committees are judicially cognizable. . . . [A] legislative committee has been held to observance of its rules, just as, more frequently, executive agencies have been." 374 U.S. at 114, 83 S.Ct. at 1832 (citations omitted); *see also Christoffel*

v. United States, 338 U.S. 84, 88-89, 69 S.Ct. 1447, 1450 (1949) ("The question is neither what rules Congress may establish for its own governance, nor whether presumptions of continuity may protect the validity of its legislative conduct. The question is rather what rules the House has established and whether they have been followed.").

70. In this case, the Legislature's complete immobilization caused by the Senators' absence demonstrates harm and prejudice sufficient to support mandamus. Without mandamus relief, no redress is available either for the absent Senators' refusal to "meet . . . when convened by the Governor," as required by Article III, § 5 of the Texas Constitution, or for their failure to comply with Senate Rule 5.03, which requires that "[n]o member shall absent himself or herself from the sessions of the Senate without leave unless the member be sick or unable to attend." TEX. CONST. art. III, §5; TEX. S. RULE 5.03.

D. NO OTHER ADEQUATE REMEDY EXISTS.

71. Mandamus, although otherwise available, may not lie if an adequate remedy exists elsewhere. *See Ark. Bldg. & Loan Ass'n v. Madden*, 44 S.W. 823, 824 (Tex. 1898) (orig. proceeding) (stating that "the writ of mandamus should not issue where the relator has another adequate legal remedy for the enforcement of his right"); *Arberry v. Beavers*, 6 Tex. 457, 1851 WL 4016, *12 (Tex. 1851) ("[Mandamus] is an extraordinary remedy, to be resorted to only when the party has no other adequate

means of redress afforded him."). In the circumstances of the present case, mandamus is appropriate because no other adequate remedy exists.

72. By fleeing the state, the absent Senators have made themselves effectively immune from the Senate's ability to compel their return through the means specified in the Senate Rules and authorized by the Texas Constitution—arrest by the Senate Sergeant-at-Arms or persons acting pursuant to his authorization. *See* TEX. CONST. art. III, §10; TEX. S. RULE 5.04. So long as they remain out of state, neither legal process nor physical compulsion is reasonably available to ensure the absent Senators' return. Moreover, the current special session—and with it, consideration of all the items included in the Governor's call—is set to expire August 26, 2003. In these circumstances, the Court's exercise of its mandamus jurisdiction is both appropriate and necessary to resolve the stalemate that has stalled the legislative process entirely.

73. For the above reasons, the Court should issue a writ of mandamus ordering any absent Texas Senator who has failed to appear and return to the Senate floor, in response to Texas Governor Rick Perry's call to convene and the pending call on the Senate, to perform their official, non-discretionary duty to appear and return to the Senate floor immediately. Unless the Texas Supreme Court were to assert jurisdiction over this question, this Court should grant this emergency mandamus relief so that the call to convene and pending call on the Senate will be complied with, and so the Texas Senate can resume its constitutional obligations and duties to the citizens of Texas.

VI.

Count One—Declaratory Judgment

74. Counterplaintiffs reallege and incorporate herein paragraphs 1 through 73.

75. Counterplaintiffs seek declaratory judgment that compelling the attendance of absent State Senators pursuant to Senate Rules 5.02 and 5.04 is lawful and consistent with constitutional authority.

VII.

Count Two—Writ of Mandamus

76. Counterplaintiffs reallege and incorporate herein paragraphs 1 through 73.

77. Counterplaintiffs seek a writ of mandamus ordering Counterdefendants to immediately return to the Senate and perform their official, non-discretionary duty to attend the legislative session called by Governor Perry on July 28, 2003.

VIII.

Count Three—Attorneys' Fees and Other Relief

78. Counterplaintiffs reallege and incorporate herein paragraphs 1 through 73.

79. Pursuant to §37.009 of the Civil Practice and Remedies Code, Counterplaintiffs respectfully request reimbursement of their attorneys' fees, costs of court, and all other relief, both in law and in equity, to which Counterplaintiffs may be justly entitled.

IX.

Prayer for Relief

80. WHEREFORE, it is respectfully prayed that Plaintiffs take nothing by their suit; that relief herein requested by Counterplaintiffs be granted; and that all such further relief be granted to which Defendants and Counterplaintiffs may be justly entitled.

Respectfully submitted,

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COUNTERPLAINTIFFS

VERIFICATION

STATE OF TEXAS §
§
TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared R. Ted Cruz, a person whose identity is known to me. After I administered an oath to him, upon his oath he said the following:

"My name is R. Ted Cruz, and I am capable of making this affidavit, and the facts contained in this affidavit are true and within my personal knowledge. I am an attorney for Counterplaintiffs David Dewhurst and Carleton Turner. I have read the foregoing Petition for Writ of Mandamus, and any facts stated in it are within my personal knowledge and are true and correct. The documents attached in the appendix thereto are true and correct copies."

_____

R. Ted Cruz

Sworn to and subscribed before me by R. Ted Cruz on August __, 2003.

_____

Notary Public in and for the State of Texas

My commission expires: _____

Certificate of Service

I certify that on August 8, 2003, a true and correct copy of the foregoing *Defendants' Original Answer and Counterclaims for Declaratory Judgment and Writ of Mandamus* was sent by certified mail and courier delivery to:

Mr. Max Renea Hicks
Attorney at Law
800 Norwood Tower
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R. Ted Cruz